

***United States Court of Appeals  
for the Second Circuit***



**EXHIBITS**





76-6143

IN THE  
United States Court of Appeals  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,  
*Plaintiff,*

vs.

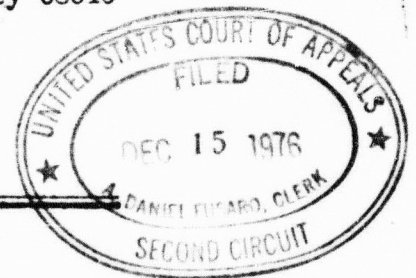
ONE 1974 PLYMOUTH FURY III SEDAN, VEHICLE  
IDENTIFICATION NUMBER PH41K4F158253,

*Defendant in Rem.*

On Appeal from Judgment of Forfeiture, Granted  
Upon Plaintiff's Motion for Judgment on the Pleadings,  
Entered by the Honorable Charles E. Stewart, U.S.D.J.  
(S.D.N.Y.) (No. 74 Civ. 4823 (CES))

*EXHIBIT 17*  
TRANSCRIPT OF A MOTION TO SUPPRESS HELD BEFORE  
HONORABLE EDWARD WEINFELD, AUGUST 19, 1974  
(UNITED STATES OF AMERICA v. HUGO MOLINO PEREZ  
(S.D.N.Y. 74 CR. 535 (E.W.)))

STEVEN H. GIFIS,  
*Attorney for Appellant,*  
68 Bayberry Road,  
Princeton, New Jersey 08540  
(609) 466-3550



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2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----X  
5 UNITED STATES OF AMERICA, :

6 v. :

74 Cr. 535 (EW)

7 HUGO MOLINA PEREZ, :

8 Defendant. :

9 -----X

10 Before:

11 HON. EDWARD WEINFELD,

12 District Judge

13 New York, August 19, 1974

14 Room 905 - 10:00 a.m.

15 APPEARANCES:

16 PAUL J. CURRAN, Esq.,

17 United States Attorney for the  
Southern District of New York,

18 By: Harry C. Batchelder, Jr., Esq.,

Special Assistant United States Attorney

19 BLAUMAN & McCABE, Esqs.,

Attorneys for Defendant,

20 By: Sidney Meyers, Esq.,

21 Simon I. Blauman, Esq., of Counsel

22 Also Present:

23 ELAINE BERKENWALD

24 Interpreter:

25 Samuel Alfonso (Spanish)

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2 (Case called.)

3 MR. BATCHELDER: Ready for the government.

4 MR. MEYERS: Defendant is ready.

5 THE CLERK: All sides ready.

6 MR. BATCHELDER: Your Honor, at this time the  
7 government would call their first witness, Special Agent  
8 Montagne.

9 THE CLERK: Before we proceed, I understand  
10 we have an interpreter, a Mr. Samuel Alfonso.

11 Do you wish the interpreter sworn before we  
12 proceed?

13 THE COURT: Yes.

14 S A M U E L A L F O N S O, was sworn as Spanish  
15 interpreter.

16 THE COURT: Have you talked with the defendant?

17 THE INTERPRETER: No, sir.

18 THE COURT: How do you know what language he  
19 speaks?

20 THE INTERPRETER: I was told I should translate  
21 into Spanish.

22 THE COURT: Does he understand you?

23 THE INTERPRETER: Yes, sir.

24 THE COURT: You understand him?

25 THE INTERPRETER: Yes, sir.



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Montagne-direct

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2 THE COURT: What language are you speaking?

3 THE INTERPRETER: Spanish.

4 J A M E S R. M O N T A G N E, called as a witness

5 by the Government, being first duly sworn, testified

6 as follows:

7 MR. BATCHELDER: May I proceed, your Honor?

8 THE COURT: I assumed you called the witness.

9 DIRECT EXAMINATION

10 BY MR. BATCHELDER:

11 Q Can I have your occupation, please?

12 A I am a special agent with the Drug Enforcement  
13 administration.

14 Q How long have you been a special agent?

15 A Approximately three years.

16 Q Calling your attention to the week of April 17th,  
17 1974, did you have occasion to meet a California informant  
18 at that time?

19 A Yes, I did.

20 Q Would you please tell us what transpired?

21 A This California informant told me that  
22 there was a man named Hugo Giving at 1505 Grand Concourse  
23 in the Bronx, New York and that this Hugo was a cocaine  
24 dealer who sold 1/8 and 1/4 kilogram quantities of cocaine.

25 Q Did he give you any other information?

1  
2 A He said he was a Negro male approximately  
3 five foot seven or eight and approximately thirty-three  
4 years old, thirty.

5 Q Did he give you any indication as to when the  
6 defendant would leave the apartment?

7 A He said he leaves the apartment almost every  
8 night with some cocaine, possibly an eighth of a kilogram  
9 of cocaine.

10 Q Has this informant previously given you reliable  
11 information?

12 A Yes. This informant had provided information  
13 which led to the arrest and conviction of two other per-  
14 sons.

15 Q Now, calling your attention to April 17, 1974,  
16 at about 10 p.m., would you please tell the Court what hap-  
17 pened on that evening?

18 A At approximately 10 p.m. on April 17th, myself,  
19 special agent Mike Levine and Emilio Garcia and this  
20 informant initiated surveillance at 1505 Grand Concourse.

21 At approximately 10:30 p.m. on the same day,  
22 the informant identified this man as leaving the building.  
23 At that point we followed this man down west on 172nd  
24 Street where he got into a car. We saw him getting into  
25 a car. At this point we arrested him by identifying

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Montagne-direct

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2 ourselves and placing the man under arrest.

3 Q All right.

4 A At this time, his rights were read to him in  
5 Spanish by Special Agent Levine and we took a Llama .38  
6 caliber pistol from him and a key case which was later  
7 found to contain approximately a gram of cocaine. At  
8 this point I went through the defendant's wallet and  
9 identified him<sup>as</sup> Hugo Molina Perez and I also found out  
10 that he lived at 1505 Grand Concourse.

11 I asked him what apartment and he said 4-J.

12 At this point I asked him if there were any  
13 narcotics in his apartment and he said there was.

14 At this point we put him back in the car. We  
15 advised him that he was not required to let us go up and  
16 get these narcotics or to search his apartment but he said  
17 that he would. We made sure that he understood this  
18 right and he told us that he understood this right.

19 Q Did you or did one of your fellow agents give  
20 him this right in Spanish or English or both?

21 A In Spanish and English.

22 Q Did he state at that time that he understood  
23 English?

24 A I spoke to him at that time then and he did  
25 understand English.



2 Q What happened next, please?

3 A At that point he got in the government vehicle,  
4 myself, Agent Levine and Hugo Molina Perez. We went back  
5 to 1505 Grand Concourse.

6 We went to Apartment 4-J. We went inside,  
7 Hugo Molina Perez took us to the refrigerator where he  
8 indicated the cocaine was. He opened the refrigerator and he  
9 said, "In the drawer there."

10 It was in the door in the side of the re-  
11 frigerator and he motioned with his head that it was  
12 there. At that point I removed approximately 8 grams of  
13 cocaine in a plastic vial.

14 Q Now, at the time you arrested him and obtained  
15 his oral consent to go to Apartment 4-J, did you have in  
16 your possession at that time a written consent form?

17 A No, I didn't because we didn't have the form  
18 with us at that time.

19 Q All right. What happened after you found  
20 the cocaine and the additional weapon?

21 A Okay. Well, we went to the apartment. We found  
22 the cocaine. We then proceeded to search the apartment  
23 and we found a .38 caliber Smith & Wesson revolver and  
24 about \$6,480, \$500 of which we had taken off Mr. Molina  
25 and a small scale.

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Montagne-direct

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Q Now, I show you --

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MR. BATCHELDER: Mr. Clerk, would you please  
mark this as Government's Exhibit 1 for identification.

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(Government's Exhibit 1 was marked for

6

identification.)

7

MR. BATCHELDER: Would you please mark this as  
Government's Exhibits 2 and 3 for identification.

8

xx

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(Government's Exhibits 2 and 3 were marked

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for identification.)

11

Q I show you what has been marked as Government's

12

Exhibit 1 for identification and ask you if you recollect

13

that, please.

14

A Yes, I do. This is the Llama .38 caliber

15

pistol which was taken .

16

THE COURT: What pistol?

17

THE WITNESS: Llama is the brand name,

18

it is .38 caliber automatic pistol which was taken from

19

Mr. Molina at the time of his arrest. Also included

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is a magazine full of ammunition.

21

Q Do you recollect whether that magazine was

22

on fire at the time you picked that weapon up.

23

A The magazine with the ammunition was in the

24

gun.

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Q Right. Was the weapon on safety or on fire; do



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you recollect?

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A I don't recall.

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Q Fine.

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MR. BATCHELDER: Would you please mark these  
as 4, 5 and 6 for identification.

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(Government's Exhibits 4, 5 and 6 were marked

8

for identification.)

9

Q I show you what has been marked as Government's  
Exhibits 2 and 3 for identification and ask if you can  
recognize those, please.

10

11

12

A Yes.

13

Exhibit 2 is the bill in which was contained  
approximately a gram of cocaine which was located in a key  
case which was taken from Mr. Molina at the time of his ar-  
rest.

14

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Q Fine. And Exhibit 3, please?

18

A Exhibit 3 is the vial of cocaine which was  
taken from Mr. Molina in a refrigerator.

19

20

Q I show you what has been marked as Government's  
Exhibit 4 and ask if you can recognize that, please.

21

22

A Yes, this is the .38 caliber Smith & Wesson  
revolver which was taken from Mr. Molina's apartment.

23

24

Q I show you what appears to be a sum of money  
marked as Government's Exhibit 5 and ask if you can recog-

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Montagne-direct

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2 nize that, please?

3 A Yes, this is the \$6,480 that was taken from  
4 Mr. Molina's apartment.

5 Q I show you what has been marked as Government's  
6 Exhibit 6 and ask if you can recognize that, please?

7 A Yes, this is the scale which was taken from  
8 Mr. Molina's apartment.

9 Q Fine. Now, subsequent to departing the apart-  
10 ment, did you have occasion to go to DEA headquarters?

11 A Yes, we had gone to DEA headquarters.

12 Q Will you please tell the Court what happened  
13 when you arrived at DEA headquarters?

14 A At DEA headquarters, Mr. Molina signed the  
15 consent to search form for the search of his apartment.

16 THE COURT: Did you say signed the consent to  
17 search?

18 THE WITNESS: Yes, your Honor.

19 THE COURT: Read the answer back, Mr. Reporter.

20 (Record read.)

21 THE COURT: I thought his name was Perez?

22 THE WITNESS: Your Honor, I think he uses the  
23 name Molina, Perez being his mother's name.

24 THE COURT: In any event, you are referring  
25 to the defendant?

2 THE WITNESS: Yes, your Honor.

3 MR. BATCHELDER: Can we have that marked, please.

4 (Government's Exhibit 7 was marked for  
5 identification.)

6 MR. MEYERS: The defendant concedes his signature  
7 on this exhibit. Beyond that we make no further ad-  
8 mission or concession.

9 Q I show you what has been marked as Government's  
10 Exhibit 7 for identification and ask if you can recognize  
11 that, please.

12 A Yes. This is a copy of the consent to search  
13 form which was signed by Mr. Molina.

14 Q You were present when that was executed, were  
15 you not?

16 A Yes, I was.

17 Q Do you recollect whether that was read to the  
18 defendant in Spanish or was it solely in English?

19 A It was read to him in Spanish by Special Agent  
20 Levine.

21 Q Now, at any time during the course of the arrest  
22 or at Drug Enforcement Administration headquarters, did  
23 you ever make any threats to the defendant?

24 A No.

25 Q Was your weapon unleached at the time you appre-



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Montagne-direct

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2 hended the defendant?

3 A At that time I apprehended him, yes.

4 Q Do you recollect with any degree of certainty  
5 whether you then placed it away or what did you do?

6 A Once he was handcuffed I put my weapon away.

7 Q Did you abuse the defendant or strike him in any  
8 way?

9 A No.

10 Q Did you detain him -- can you tell the Court  
11 approximately how long it took you from the time you appre-  
12 hended the defendant until the time he was lodged in the  
13 Federal House of Detention?

14 A It was approximately two hours.

15 Q About two hours. Were you present at the time the  
16 defendant was interrogated in the United States Attorney's  
17 office?

18 A Yes, I was.

19 Q And do you recollect with any degree of certainty  
20 whether the defendant made certain admissions during the  
21 course of that interrogation?

22 A At that time he admitted that the cocaine that  
23 was found in his refrigerator was his and that he had taken  
24 us there and given it to us.

25 Q Do you recollect whether he ever stated that he

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didn't have to let them search his apartment but that he  
had signed the consent?

A He also stated that he understood that we  
explained his rights not to have his apartment searched  
and that he allowed us to search it anyhow.

Q Did he also state that he understood everything  
you said in English and in Spanish to him?

A Yes, he did.

MR. BATCHELDER: Your Honor, at this time the  
government would introduce Government's Exhibits 1 through  
7 into evidence.

THE COURT: Show the exhibits to counsel.

MR. BATCHELDER: I have, your Honor.

MR. MEYERS: Your Honor, the defendant  
objects on the grounds that the items offered in evidence were  
the result of an illegal arrest and illegal search and  
seizure.

THE COURT: Overruled.

(Government's Exhibits 1 through 7 inclusive  
for identification were received in evidence.)

MR. BATCHELDER: The government has no further  
questions of this witness.

THE COURT: Counsel for the defendant?

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Montagne-cross

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CROSS EXAMINATION

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BY MR. MEYERS:

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Q Did you testify before the grand jury that  
handed out the indictment in this particular case?

6

You had?

7

A Yes.

8

MR. MEYERS: May I have a copy of his grand  
jury minutes, Mr. Batchelder?

10

THE WITNESS: I am not certain if I did or  
Special Agent Garcia did.

12

MR. MEYERS: Your Honor, may we have a few  
minutes to look at the testimony.

14

(Pause.)

15

MR. MEYERS: Thank you, your Honor.

16

Q Agent Montagne, when for the first time during  
the week of April 17th of 1974, did you first receive any  
communication from the informant that you have referred to?

19

A During the week of April 17th, I spoke to the  
informant many times and I am not certain which time.

21

Q Had you received any word from the informant  
pertaining to the defendant Perez as early as April 10th  
of 1974?

24

A Yes.

25

Q So that between April 10th of 1974 and



1  
2 April 17th, you had received all the information that  
3 you have testified to which created a surveillance  
4 of Mr. Perez on April 17; is that right?

5 A Yes.

6 Q Between April 10th of 1974 and the evening of  
7 April 17th, 1974, did you or any of the other agents make  
8 any attempt whatsoever to secure either an arrest warrant  
9 or a search warrant pertaining to Mr. Perez?

10 A No.

11 Q Between April 10th of 1974 and the evening of  
12 April 17, 1974, did you have in your possession sufficient  
13 information in your opinion to have secured a search war-  
14 rant of the apartment occupied by Mr. Perez?

15 A Not until we saw Mr. Perez leave the building.

16 Q Are you saying that that was the only thing that  
17 was lacking which would have enabled you to secure a search  
18 warrant, that is the physical leaving of Mr. Perez on  
19 the evening of April 17th from the apartment; is that the  
20 point?

21 MR. BATCHELDER: Objection, your Honor, it calls  
22 for a legal conclusion on behalf of the witness.

23 THE COURT: I will sustain it as to form.

24 MR. MEYERS: I see.

25 Q Now, in relation to this informant, had you

utilized his information prior to April 10th of 1974  
on any other occasion?

A Yes, sir.

Q What was the last occasion, timewise, prior to  
April 10, 1974 that you had last either been in touch  
with or had utilized any information that had been supplied  
to you by this informant pertaining to anything pertaining  
to narcotics?

A I believe it was approximately six weeks before  
Mr. Molina's arrest.

Q Two weeks ago?

A Two weeks before that this informant had  
supplied information which led to the arrest and con-  
viction of two other men.

Now, after that I talked to the informant  
at various times before, you know, Mr. Molina was arrested.  
I am not certain how many times.

Q On how many other occasions prior to April 10th,  
1974, had you or the other agents utilized any information  
supplied by your informant pertaining to any narcotic  
transactions? Or was that the only isolated transaction  
that you speak about?

A That is the only one, yes.

Q So, as I understand it, it was about two weeks



1 prior to April 10th that you received some information  
2 from this informant. Did it pertain at all to Mr. Perez  
3 or was it an entirely different matter?  
4

5 A That information happened to be a different  
6 matter, yes.

7 Q What was the outcome of the information that had  
8 been supplied to you by this informant on this isolated  
9 transaction that you speak about?

10 A It led to the arrest and conviction of two men  
11 for possession of narcotics.

12 Q Now, had you paid this particular informant  
13 for their information?

14 A For their particular information on this other  
15 instance, no, I don't believe he was paid.

16 Q Now, Agent Montagne, the information that you  
17 received what you referred to as an informant pertaining  
18 to Mr. Perez, isn't it a fact that that was merely an  
19 anonymous call that you received and that the individual  
20 was not an informant?

21 MR. BATCHELDER: Objection, your Honor, he has  
22 already testified as to where he got the information from.

23 THE COURT: This is cross examination,  
24 he has a right to ask him, does he not? Simply because  
25 he said he received it from an informant --

MR. BATCHELDER: Then I would object to the form, as far as he says, isn't it a fact that it is anonymous.

THE COURT: He can answer that.

A This is not an anonymous call. This informant had provided previously reliable information.

Q On that one isolated occasion, isn't that so?

A Yes.

Q Did you base the reliability of this information as far as this informant was concerned, solely on the isolated instance that you have referred to that you say occurred prior to April 10th of 1974?

A Yes. His reliability was largely based on this previous arrest of these other two men.

Q Now, have you ever heard of Mr. Perez prior to April 10, 1974?

A His name was mentioned to me by the informant prior to that once or twice.

Q That is during the week of April 10th to 17th; is that so?

A His name was mentioned to me prior to that week also.

Q Now, other than what you had been informed by the informant, you had no independent knowledge whatsoever, did you, of anything pertaining, personal knowledge,

independent of what had been informed to you by the informant as to the activities, if any, of Mr. Perez; isn't that so?

A That is so.

Q You were relying solely on the information that had been conveyed to you by the informant?

A That is right.

Q On April 17, 1974 at approximately what time did you first approach the apartment 1505 Grand Concourse in the Borough of the Bronx?

A At approximately 10 p.m.

Q And you were in the company of whom at that particular time?

A Special agents, Garcia, Levine and the informant.

Q How were you dressed?

A Casually.

Q You were not dressed in anything that would identify you as being an officer, were you?

A No.

Q Were you using an unmarked car?

A Yes.

Q How many were in that particular car?

A Special Agent Levine and I were in one car and Special Agent Garcia and the informant were in another



1  
2 car.

3 Q Now, you got to the apartment at 1505 Grand  
4 Course at or about 10 p.m. that evening; is that right?

5 A Yes.

6 Q You remained there until what time until you  
7 first saw Mr. Perez leave the apartment?

8 A Approximately 10:30.

9 Q There did come a time at or about 10:30 p.m.  
10 when you saw a gentleman leave the apartment, is that  
11 right?

12 A Yes.

13 Q You didn't know who he was, did you? Of your  
14 own knowledge?

15 A Just from the description that the informant  
16 had given us.

17 Q Was the informant in the same car that you were?

18 A He was in another car but we had radio communi-  
19 cation.

20 Q Where was this radio car in which the informant  
21 was in relation to the car that you were situated in?

22 A Parked directly across the street from the en-  
23 trance of 1505 Grand Concourse was this other car and my  
24 car was on Grand Concourse and north of 1505 Grand Con-  
25 course.

1  
2 Q I see.

3 Now, you saw the defendant leave the apartment  
4 1505 and when you saw him leave, first, do you recall  
5 how was he dressed? Did he wear an overcoat?

6 A I don't recall.

7 Q At what point did you learn that this was the  
8 Mr. Perez?

9 A Agent Garcia contacted us on the radio.

10 Q The radio was in this car which was on the  
11 opposite side of the street; is that right?

12 A Yes.

13 Q When you spoke to the informant some time around  
14 April 10th of 1974, did he tell you what Mr. Perez was  
15 accustomed to do or what he was going to go that particular  
16 evening on April 17th, 1974?

17 A He told us what he usually did.

18 Q What he used to do.

19 MR. BATCHELDER: Objection. As to what he  
20 used to do, your Honor. He testified what he usually did.

21 Q Did this informant tell you that on the evening  
22 of April 17, 1974, that Mr. Perez would have on his person  
23 cocaine which he intended to sell or distribute?

24 A The informant told us that he would have co-  
25 caine; that he was intending to distribute.

2 Q My question to you, Agent: Did he tell you that  
3 that's what would occur or what he had been accustomed to  
4 doing?

5 THE COURT: The witness answered your question  
6 very directly before.

7 MR. MEYERS: Fine.

8 Q Now, as Mr. Perez left the apartment, where did  
9 he go?

10 A He left the front door of 1505 Grand Concourse  
11 and he walked west on 172 Street to Wythe Street. His car  
12 was parked near the intersection of 172nd and Wythe Street.

13 THE COURT: White Street?

14 THE WITNESS: W-y-t-h-e.

15 Q Approximately how far was 172nd Street and Wythe  
16 Avenue from the apartment 1505 Grand Concourse?

17 A About a block.

18 Q Would you say that the -- Mr. Perez was walking  
19 at a normal gait towards what? Towards his automobile?

20 A Yes.

21 Q What did you do, did you follow him?

22 A Yes. We followed him -- yes, we followed  
23 him.

24 Q Did the car in which the informant was located  
25 follow Mr. Perez?



1  
2 A The informant was dropped off the other car and  
3 then Special Agent Garcia joined us to arrest Mr. Molina.

4 Q Did the informant at all accompany any of the  
5 agents to 172nd and Wythe Avenue?

6 A No.

7 Q The only identification made by the informant  
8 was at the moment as Mr. Perez was leaving the apartment  
9 1505 Grand Concourse; is that so?

10 A He pointed Mr. Molina out to Agent Garcia.

11 Q That is through this radio communication?

12 A No. The informant was with Agent Garcia.

13 Q All right. Now when Mr. Perez reached the  
14 intersection or corner of 172nd Street and Wythe Avenue in  
15 the Bronx, what, if anything, occurred there? Did he get  
16 into his car?

17 A He did get into his car, yes.

18 Q Had he started the car?

19 A I don't believe it was started yet. No.

20 Q Was there anybody else in the car with him at  
21 that particular time?

22 A No.

23 Q What did you do, that is insofar as the car that  
24 you were driving?

25 A Myself and Agent Levine were in another car.

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Montagne-cross

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We drove up alongside Mr. Molina and place him under arrest; identified ourselves and placed him under arrest.

Q Is it a fair statement to make, Agent Montagne, that as you drove your car and came alongside of the car of Mr. Perez, that at that particular point, Mr. Perez' movements were restrained? He was in custody, wasn't he? He couldn't go anywhere, could he?

A He wasn't in custody until we identified ourselves and placed him under arrest.

Q Well, you left your car. Did any of the agents including yourself draw their gun as you left your car?

A As we arrested Mr. Perez, we had drawn our guns, yes.

Q And approximately how much time elapsed from the point that Mr. Perez entered the car up to the point that you placed him under arrest? Was it a matter of seconds?

A I would say about a minute.

Q This was a dark area, wasn't it, at 10:30 at night, at 172nd Street and Wythe Avenue?

A Yes.

Q You were concerned with whether or not Mr. Perez might or might not be carrying a gun; isn't that so?

A Yes.



2 Q Isn't it a fact that all of the agents drew  
3 their guns at the time they approached this automobile?

4 A This is true, yes.

5 Q Pardon, I didn't get the answer.

6 A Yes.

7 Q How many agents had their guns drawn at this  
8 particular point, three?

9 A Myself and Agent Levine.

10 Q The first thing you did was order him out the car;  
11 is that right?

12 A Yes.

13 Q Did you place handcuffs on him at that particular  
14 point?

15 A No.

16 Q At what particular point did you place handcuffs  
17 on Mr. Perez?

18 A After I had searched him and taken the gun  
19 from him.

20 Q And in order to get the gun, where was this gun  
21 located?

22 A It was in his belt, right here.

23 Q Did you have to reach into the inner portion  
24 of his coat pocket in order to get it?

25 A In his coat pocket? I believe it was right

here. I don't know whether it was in his coat pocket or what. I just felt it there and pulled it out.

Q Was he being searched while he was outside the car?

A Yes.

Q Had you turned his face toward the car and told him to hold his hands up?

A No, I told him to put his hands on the car.

Q The three agents were surrounding him at that particular point?

A Yes.

Q Were there guns drawn?

A Until we put handcuffs on Mr. Molina our guns were drawn.

Q When you found the gun, was it at a particular point that you then placed the handcuffs on Mr. Perez?

A Yes.

Q In which way did you place them, around his back?

A Yes.

Q Then did you continue to search Mr. Perez' person?

A Yes.

Q And what did you find?

A We found a key case, which was found to contain

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Montagne-cross

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approximately a gram of cocaine.

Q Where did you find that key case?

A I believe it was in his hand, I'm not sure or in his coat pocket.

Q That key case was a closed key case; wasn't it?

A Yes.

Q One that snapped on?

A One that what, sir?

(Defendants' Exhibit A was marked for identification.)

Q Agent Montagne, I show you Defendant Perez' Exhibit marked A for identification and ask you if this is the type of key case that you took into your possession from Mr. Perez?

A Yes, it is the same type.

MR. MEYERS: Your Honor, Defendant Perez offers Defendant's Exhibit A.

MR. BATCHELDER: No objection, your Honor.

(Defendant's Exhibit A for identification was received in evidence.)

Q Now, Agent Montagne, at the time that you took this key case into your possession, was it zippered, was it locked at that particular point?



A I don't recall.

Q What did you do with it? Did you automatically put it into your pocket after you took it from Mr. Perez?

A I had it in my hand and I believe I put it into my pocket.

Q You say you examined the content of that particular key case at that particular point?

A Not at that point. Just his keys. The cocaine was found later at DEA headquarters.

Q In what portion of the key case was the \$5 bill located?

A I think it was stuck right under this flap, but it was bulging out.

Q It wasn't visible to view, was it, at the time you took the key case into your possession?

A Well --

Q You couldn't see it visibly at that point if you opened the key case?

A If I had opened it?

Q Assume you had opened it, could you have seen the \$5 bill?

A Yes.

Q Wasn't it located inside the --

A It was stuck just inside this flap here.

Q This was a little piece sticking out, is that what you are saying?

A It was so big, you would be able to see it by looking at it like this.

Q Did you take anything else from Mr. Perez during the course of that personal search at the scene of the arrest?

A His wallet.

Q Did you take any notebook from Mr. Perez at that point of telephone numbers?

A I don't recall.

Q Did you make an inventory of what you had taken from Mr. Perez?

A Yes.

Q Do you have such an inventory?

A Yes.

Q Who has that at the present time?

A I believe Agent Garcia would have it.

Q If you did take a telephone book from Mr. Perez at the point of the arrest, do you know whether or not any calls were ever made to any of the names indicated in that particular telephone book?

MR. BATCHELDER: Objection as irrelevant.

THE COURT: Objection sustained.



1  
2 Q Now, you say there was a \$5 bill in the  
3 key case; correct?

4 A Yes.

5 Q And was there any cocaine imbedded within this  
6 \$5 bill?

7 A Yes, there was.

8 Q This cocaine that was in the \$5 bill, was it in  
9 a little bag or was it loose and then wrapped with this  
10 \$5 bill?

11 A It was loose in the \$5 bill.

12 Q In other words, there was no other wrapping or  
13 little plastic bag which contained this .97 grams of  
14 cocaine; isn't that right?

15 A That is right.

16 Q All you found in this search of Mr. Perez'  
17 person was the .97 grams of cocaine which you said was  
18 in loose form in the \$5 bill in the key case, isn't that  
19 so?

20 A That is right.

21 Q Isn't it a fact, Agent Montagne, that you never  
22 discovered that particular \$5 bill with this cocaine  
23 until you had taken Mr. Perez down to the FBI headquarters  
24 for processing?

25 A Sir, it is the Drug Enforcement Administration.

2 Q I don't hear you.

3 A Sir, it is the Drug Enforcement Administration  
4 headquarters for processing and that is when we found it.

5 Q You never observed this \$5 bill with cocaine in  
6 in the key case at the point of arrest and it didn't come  
7 to your attention until some time thereafter when Mr.  
8 Perez was being processed down the FBI headquarters; isn't  
9 that so?

10 A That's so.

11 Q What you are saying you took the key case  
12 from Mr. Perez at the scene of the arrest and you found  
13 the \$5 bill with cocaine is not correct; isn't that cor-  
14 rect?

15 A I said the cocaine was found in the key case,  
16 not at the time of the arrest.

17 Q When was it discovered?

18 A At the time of his process at DEA headquarters.

19 Q At the time you made the arrest, you were  
20 not aware of the fact, were you, that Mr. Perez was carry-  
21 ing any cocaine; isn't that so?

22 A That's true.

23 Q All you knew was that he had a gun in his  
24 possession; isn't that so?

25 A True.



Q Now, when you made the arrest, did you or any of the other agents give Mr. Perez what we refer to -- what you refer to as the constitutional rights?

A Yes.

Q How did you do that, did you read from a card or did you give it to him orally?

A I believe it was orally.

Q Tell us specifically what you told him?

A Well, I didn't tell him.

Q What did you hear being told to Mr. Perez?

A I don't speak Spanish and his rights were told to him in Spanish.

Q Who gave those rights in Spanish?

A It was either Special Agent Levine or Garcia. Both of them speak Spanish.

Q You of your own knowledge don't know the nature, the form or whether all the constitutional rights that are required were given to Mr. Perez; do you?

A That is true.

Q You don't know that of your own knowledge?

A No.

Q They were given in Spanish; weren't they?

A True.

Q You assumed they were the constitutional



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2 rights?

3 A Yes.

4 Q Now, how long did you remain at the scene of the  
5 arrest?

6 A A few minutes.

7 Q Where did you go from 172nd Street and Wythe  
8 Avenue?

9 A We went back to 1505 Grand Concourse.

10 Q How did you get back from 172nd Street and  
11 Wythe Avenue, back to the apartment 1505 Grand Concourse?

12 A We drove in a government vehicle.

13 Q Was Mr. Perez still in handcuffs at a particular  
14 point?

15 A Yes, he was.

16 Q From the moment you left 172nd Street and  
17 Wythe Avenue, did you continue to have in your physical  
18 possession the key chain or the key holder with the keys?

19 A Yes.

20 Q And you had the gun with you?

21 A Yes.

22 Q Why did you go back to 1505 Grand Concourse?

23 A I determined that Mr. Molina lived at 1505  
24 Grand Concourse from papers in his wallet and I asked him  
25 if he lived there and he said yes he lived in Apartment 4-J.

2 I asked him if there were any narcotics in his apartment  
3 and he said yes, there were. And I said, "Well, could we  
4 go up and get them?"

5 And he said, "Yes."

6 And we explained to him that he did not have to  
7 permit us, to let us go up and get this cocaine, but he  
8 said he would let us go up and get it.

9 Q This conversation that you have described, was  
10 that in Spanish?

11 A That particular conversation was in English.

12 Q My question was: Was it entirely in Spanish?

13 A No.

14 Q What portion was not in Spanish?

15 A This particular conversation was in English.

16 Q In other words, the constitutional rights  
17 were given in Spanish and this lengthy conversation that  
18 you describe was given in English; is that the point?

19 A Yes.

20 Q Do you know whether or not the man understood  
21 what you were talking about?

22 A At what point?

23 Q During the course of this conversation you  
24 described.

25 A Yes, because I spoke to him and I knew he spoke



English also.

Q Isn't it a fact, Agent Montagne, that you and the other agents were very, very disappointed because you had expected to find a great amount of cash and narcotics on this particular defendant?

A I wasn't disappointed.

Q Did you search the car that he was driving?

A Yes, we had.

Q Did you find anything at all in the way of contraband of any nature whatsoever?

A No.

Q Are you saying that Mr. Perez consented voluntarily, said, "Come on back to the apartment and I'll let you search and do whatever you want there." Is that what you are saying?

A Yes, he did.

Q During this lengthy conversation that you described, did the agent including yourself have their gun out?

A Yes.

Q At that time he had been handcuffed?

A Yes.

Q Couldn't move in any shape, manner or form?

A He could move, but he was handcuffed.



Q You drove him back to 1505 Grand Concourse and then went up to his apartment. What floor was his apartment on?

A I believe it was 4.

Q How did you get access to the apartment physically?

A I opened it with his keys.

Q With the key chain and the key ring and so on that you had in your possession; is that right?

A Yes.

Q You opened the door, he didn't open the door?

A Well, he told us which door it was and took us to the door and I opened it.

Q During all the time, up to the point where you were about to enter that apartment, he was still handcuffed?

A Yes.

Q A time came when you entered the apartment. First, who entered the apartment in addition to yourself and Mr. Perez?

A Special Agent Levine.

Q Just two agents with Mr. Perez in the apartment; is that right?

A Yes.

Q How big an apartment was it?

A One large room and a kitchen.

Q What was the first room that you entered as you opened that door?

A The large living room.

Q What, if anything, occurred when you got into the apartment? Did Mr. Perez still continue to remain in handcuffs?

A He was in handcuffs, yes.

Q What time did you leave the apartment, approximately?

A Approximately a half hour later.

Q During this entire half-hour period that you were in the apartment, did Mr. Perez continue to be handcuffed?

A Yes.

Q At no time were handcuffs removed, is that right, during his presence in the apartment?

A That is true, yes.

Q What, if anything, did you or the other agents do when you got into the apartment? Did you make a search?

A When we got into the apartment, Mr. Perez led us to the refrigerator.

Q My question to you --

MR. MEYERS: Your Honor, I ask that the answer be

stricken out as not responsive.

Q Did you make a search of the apartment?

A Yes.

Q What portion of the apartment did you search?

A We searched the refrigerator first, because Mr. Perez led us to the refrigerator.

Q Let us confine ourselves for the moment to the refrigerator. The refrigerator door was closed; wasn't it?

A It was closed, yes.

Q You opened the refrigerator door and what, if anything, did you find in the way of drugs in that particular refrigerator?

A I didn't find anything until Mr. Perez nodded and said it was right there and pointed with his head and then I found this vial of cocaine.

Q You did find some drugs in that refrigerator; is that right?

A Yes.

Q How was it encased?

A It was in a plastic vial, about 3, 3-1/2 inches long.

Q Did you discover the amount of the contents of that drug was 7.57 grams?



1  
2 A Approximately.

3 Q You are saying there were about 8.57 grams  
4 in all of cocaine, of which .97 were taken from this key  
5 case?

6 A Yes.

7 Q That would have left roughly about 7.57 grams  
8 of cocaine which would be in this plastic vial?

9 A Yes, plastic vial.

10 Q Did you search for anything else and find anything  
11 else in the apartment?

12 A Yes, and when we did search the entire apart-  
13 ment, we found a .38 caliber Smith & Wesson revolver.

14 Q Where was that gun which you say you found?

15 A It was in a closet.

16 Q Was it in a box?

17 A Yes.

18 Q You had to open the box in order to find it; is  
19 that right?

20 A Yes.

21 Q Did you find anything else in the apartment?

22 A Yes. We found approximately \$6,000.  
23 With the money we had taken off Mr. Molina it came to  
24 \$6,480.

25 Q Where was the currency located?

2 A It was in a box.

3 Q What sort of box?

4 A Metal box.

5 Q Did it have a combination lock on it?

6 A It did, but it was not locked.

7 Q It was not locked?

8 A No.

9 Q Where was that box located?

10 A In a closet near the door of the apartment;  
11 the entrance.

12 Q Was it covered with any material of any kind so  
13 it couldn't be observed?

14 A I believe it was no, no. It was laying in the  
15 closet.

16 Q You had to open the box to get at its content?

17 A Yes.

18 Q It couldn't be in what we refer to as plain  
19 view?

20 A That is right.

21 Q During the entire time you were in the apartment,  
22 this half hour, did you or any of the other agents ever  
23 give Mr. Perez his constitutional rights? Did you tell  
24 him what his constitutional rights were?

25 A We had already done that.

1  
2 Q I didn't ask you that. I said while you were  
3 in the apartment, did you, at any time, give Mr. Perez his  
4 constitutional rights?

5 A No.

6 Q Tell him what they were?

7 A No.

8 Q You left the apartment about a half hour  
9 after you had gone there and I take it -- did you have in  
10 your possession at that point, the items that you had  
11 searched for and found in the apartment?

12 A Yes.

13 Q That is the plastic container of drugs -- did  
14 you have a box with the currency or did you take the currency  
15 out of the box?

16 A I believe we took the box.

17 Q And you had this other gun that you say you  
18 found in the closet, is that right?

19 A Yes.

20 Q Where did you go after you left the apartment?

21 A We went to the Drug Enforcement Administration  
22 headquarters at 555 West 57th Street here in New York.

23 Q During the time that you were in the apartment,  
24 during that half-hour period, did you ever ask Mr. Perez  
25 to sign a document called a consent to search?



2 A We didn't have the form at that time.

3 Q You did not have it?

4 A No.

5 Q So that Mr. Perez couldn't have signed a  
6 consent to search in the apartment; isn't that so?

7 A That is so.

8 Q And in addition physically he was handcuffed?

9 A Yes.

10 Q So in your response to the defendant's motion  
11 for an omnibus --

12 MR. MEYERS: May I call your Honor's at-  
13 tention to the effect that the reply of the government  
14 to the defendant's omnibus motion on page 3, referring  
15 to 3-C-1, a statement is made "Written consent was given  
16 while in the apartment 4-J at the above address."

17 THE COURT: Where is the government's reply?  
18 I don't have it here.

19 MR. BATCHELDER: It was filed, your Honor.  
20 I will hand up my copy.

21 THE COURT: You had filed it?

22 MR. BATCHELDER: Yes, I did, your Honor.

23 THE COURT: What are you referring to?

24 MR. MEYERS: Page 3, your Honor, referring to  
25 Item 3-C-1.

2 THE COURT: That is an affidavit by the  
3 assistant. It is not by this witness. Yes.

4 MR. BATCHELDER: The government will concede  
5 I was in error, from what I have heard.

6 THE COURT: Go ahead. I am taking the testimony  
7 of witnesses here.

8 Q In other words, Agent Montagne, the only time  
9 that Mr. Perez put his signature on any particular form  
10 which developed as being a "consent to search" that that  
11 took place at the FBI headquarters during the course of  
12 processing of Mr. Perez; isn't that so?

13 A No, sir, it is Drug Enforcement Administration  
14 headquarters.

15 Q Drug Enforcement?

16 A Yes.

17 Q In any event, it took place at some time sub-  
18 sequent to the period you had left the apartment 1505  
19 Grand Concourse; isn't that so?

20 A Yes.

21 Q After you had completed your search; isn't that  
22 so?

23 A Yes.

24 Q Now, approximately what time did you get to the  
25 Drug Enforcement Division or processing of Mr. Perez?



2 How soon after you had left the Apartment 1505 Grand  
3 Concourse?

4 A We drove directly from 1505 Grand Concourse to  
5 555 West 57th Street. About twenty minutes.

6 Q Approximately how long was Mr. Perez being  
7 processed at that division that evening?

8 A The processing was finished in less than two  
9 hours.

10 Q Is it a fair statement to make then that he was  
11 being processed at the Drug Enforcement Division for  
12 approximately two hours or more?

13 A Or less.

14 Q Or less?

15 A Yes.

16 Q And that would take us then somewhere to about  
17 12:30 or 1 o'clock in the morning?

18 A Yes.

19 Q And during this entire period, was he being  
20 questioned by any of the agents of that division?

21 A Yes.

22 Q At what point during that examination, timewise,  
23 was Mr. Perez first presented with the consent to search?

24 A It was the first thing we had when we arrived at  
25 DEA headquarters.



2 Q In other words, as soon as you had gotten to the  
3 Drug Enforcement Division, the first thing you had was  
4 have him sign a consent?

5 A Yes.

6 Q Did you tell him what the nature of it was?

7 A Yes.

8 Q Was that told to him in Spanish or English?

9 A In Spanish and English.

10 Q Did you know what question was being asked or  
11 what information was being given to him in Spanish?

12 A I don't speak Spanish, no.

13 Q You gave it to him in Spanish at a particular  
14 point?

15 A Special Agents Levine and Garcia.

16 Q Was he one of the agents that had accompanied  
17 you to 172nd and Wythe Avenue?

18 A Yes.

19 Q Mr. Perez executed or put his signature on this  
20 particular document consent to search; is that right?

21 A He did that.

22 Q Now, having received that consent to search  
23 that evening, you didn't go back to the apartment and  
24 resume your search?

25 A Yes.

2 Q You arrested on the search that had already  
3 been made; is that right? You presumed you were validating  
4 a search that had already been made?

5 MR. BATCHELDER: Objection, your Honor.

6 THE COURT: Sustained as to form.

7 Q Now, Agent Montagne, when you approached 172nd  
8 and Wythe Avenue, did there come a time when a taxicab  
9 approached that particular place?

10 A I imagine there are a lot of taxicabs. Are you  
11 speaking of one in particular?

12 Q Yes. I am speaking of one in particular.  
13 In other words, while you were making your surveillance  
14 at 1505 Grand Concourse at about 10 p.m. on the evening  
15 of April 17th, prior to that time had you made arrange-  
16 ments that there would be certain cars to meet in front  
17 of premises 1505 Grand Concourse?

18 A I don't understand.

19 Q To conduct the surveillance?

20 A Yes.

21 Q Among those cars that you had arranged, was it  
22 also arranged that there would be a taxicab being driven  
23 by one of your agents?

24 A Yes, sir.

25 Q Is it a fact -- where was this taxicab located,



being driven by one of your agents, at the point where you started your surveillance at 1505 Grand Concourse?

A I believe it was across the street from 1505 Grand Concourse. Across the street from 1505 Grand Concourse.

Q In addition to your car, you had the car in which the informant was located across the street?

A The informant was in the taxicab.

Q It was the taxicab, that there was a radio communication between the taxicab and your car?

A Yes.

Q Did the taxicab continue to 172nd Street and Wythe Avenue as you saw Mr. Perez leave the apartment?

A Yes, he did.

Q So that there were two cars that approached Mr. Perez at 172nd Street and Wythe Avenue, isn't that so?

A That is so.

Q Your car with how many agents in it?

A Myself and another agent.

Q This taxicab with another agent?

A Yes.

Q You had let the informant go; is that right?

A Yes.

Q All this had been pre-arranged as far back as



1 April 10, 1974?

2 A All what had been arranged?

3 Q The surveillance. In other words, as far back  
4 as April 10, 1974, when, as I understand it, you first  
5 received some word from an informer it was arranged that  
6 there would be a surveillance in front of 1505 Grand  
7 Concourse at which there would be your car, a taxicab,  
8 ostensibly a normal taxicab to be driven by one of your  
9 agents. That had been planned and premeditated before  
10 April 17, 1974; isn't that so? It wasn't a spontaneous  
11 situation, was it?

12 A No.

13 Q You did have, did you not, plenty of time prior  
14 to April 17, 1974, if you thought that the information of  
15 your informant was reliable, to have enabled you to have  
16 gone down and gotten yourself either an arrest or search  
17 warrant or both; isn't that so?

18 A Would you say that again?

19 Q Yes.

20 Isn't it a fact that you knew as far back as  
21 April 10th, with all the arrangements that were made, that you  
22 had plenty of opportunity to have gone down prior to  
23 April 17, 1974, to have gotten either an arrest warrant  
24 or search warrant or both pertaining to Mr. Perez; isn't  
25

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2 that so?

3 MR. BATCHELDER: Objection as irrelevant,  
4 the question is what he did at that time.

5 THE COURT: Overruled.

6 A The answer to your question --

7 MR. MEYERS: No further questions.

8 MR. BATCHELDER: May the witness be allowed to  
9 answer the question?

10 A I would say there was ample time.

11 Q I am sorry.

12 A I would say there was ample time to obtain a search  
13 warrant.

14 MR. MEYERS: No further questions.

15 MR. BATCHELDER: May I have two further questions,  
16 your Honor?

17 REDIRECT EXAMINATION

18 BY MR. BATCHELDER:

19 Q At the time you arrested the defendant,  
20 did you have information in your possession that he might  
21 be armed?

22 A Yes.

23 Q At the time you arrested the defendant and he was  
24 questioned, did the defendant tell you there was something  
25 in the key case?



A Not at the time he was arrested.

Q Could you please fix for the Court when it was?

A We later found the cocaine in the key case when we took him to DEA headquarters and I had the key case in my hand and he nodded to me and said there was something else in there.

Q Did he say that in English or Spanish?

A He said that in English.

Q At any time that you questioned the defendant with respect to his consent to search, did you tell him that you didn't have the forms and you would have to get the forms later on?

A Yes, we told him we would have the forms and have him sign it as soon as we get the forms.

THE COURT: You said you had ample time to get a search warrant between April 10th and April 17th, why didn't you apply for one?

THE WITNESS: At that time, I don't believe my probable cause was sufficient.

MR. BATCHELDER: Your Honor, the government has no further questions of this witness.

THE COURT: What are the factors that made you believe that you had probable cause at the time of the arrest?



THE WITNESS: One of the factors was that Mr. Molina had left his apartment at the time the informant stated that he would.

THE COURT: All right.

MR. BATCHELDER: Your Honor, the government at this time would call Special Agent Levine.

M I C H A E L L E V I N E, called as a witness

on behalf of the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BATCHELDER:

Q Your occupation, please?

A I am a special agent with the U.S. Justice Department, Drug Enforcement Administration. I have been a federal agent for ten years.

Q Calling your attention to April 17, 1974, did you have occasion to participate in the arrest of one Hugo Molina Perez?

A Yes, I did.

Q Will you please tell the Court what happened?

A That night we were watching a building, I believe, on Grand Concourse near the corner of 172nd Street, in the Bronx. I was with Special Agent James Montagne in a government vehicle and Special Agent Emilio Garcia was in

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2

radio contact with us in another vehicle. I believe it

3

was a taxicab and with Special Agent Garcia was a

4

confidential informant. At this time I can't recall the

5

exact time. I believe it was close to 10 o'clock at night.

6

We received a radio message that the person who we were

7

expecting had exited the building and was walking away.

8

Myself and Special Agent Montagne drove around the block

9

and I think it was Wythe Street we observed someone who

10

had met the description we had just gotten over the radio.

11

That was the defendant Hugo Molina. We saw him get into

12

a car. We backed our vehicle with a revolving red light

13

up alongside his car. Both of us got out of our car.

14

We had previously been warned by the informant that Molina

15

had carried a gun and that he would use it and the informant

16

told us several times to be very careful.

17

I got out the driver's side of the vehicle.

18

I am not sure where my partner got out, and was behind the

19

government car and I told Mr. Molina to put his hands up

20

where I could see them, which he did not do. I told him

21

"Put your hands up where I can see them." I told him

22

in Spanish and in English and he again didn't put his hands

23

up and both, I believe Montagne and I start screaming

24

"Get your hands up" and he finally did put his hands up

25

where I could see them. I am not sure whether it was



2 Montagne or I or both of us, but we took him from the car,  
3 keeping his hands in view and he had a fully loaded gun  
4 in his belt at that time. We placed him under arrest.  
5 I gave Mr. Molina a statement of his constitutional rights  
6 in both Spanish and in English. He told me he spoke English  
7 perfectly well. He told me he had no problem understanding  
8 English.

9 I asked him where he lived. He told me, I  
10 believe, it was the same address we had seen him come out of  
11 on Grand Concourse and he gave me the apartment number and  
12 I am not sure at this time what apartment it was. I think  
13 it was Apart 4-J. I asked Mr. Molina if he had anything  
14 else in the apartment and he said yes, he had a little  
15 more coke, a little coke and another gun in the apartment.  
16 I asked him if he would give his permission to search  
17 the apartment. He said yes, he would.

18 I explained to him that anything we found in  
19 the apartment would be used against him and that he did not  
20 have to give the right to search his apartment. He could  
21 demand that we get a warrant. He said no, go ahead now.

22 I also explained to him that we had forms for  
23 consent to search and that these forms, he would have to  
24 sign one of these forms that he is giving us the consent  
25 to search the apartment.



2 He agreed to do it. At the time we didn't have  
3 forms with us. We drove immediately back to his apartment.  
4 He told us that the cocaine that he had was in the  
5 refrigerator, where I found a vial of cocaine and that the  
6 gun was in a box, I believe, in a closet where we found  
7 the gun along with a quantity of money, I think about  
8 \$6,700 or so. Molina was then taken to 555 West 57th  
9 Street, where we processed him, that is fingerprinted him and  
10 photographed him and where he signed the statement giving  
11 us the authority to search the apartment.

12 After reading it, we asked him if he had any  
13 trouble understanding that. He told me no. He under-  
14 stood. He signed it. We then lodged him, I believe,  
15 at West Street and that I think is the last time I saw  
16 Molina until today.

17 Q I show you what has been marked as Government's  
18 Exhibit 7 in evidence and ask if you can recognize that,  
19 please.

20 A This is the consent to search form that Mr. Molina  
21 executed that night for myself, Montagne and Garcia.

22 Q Do you recall whether you read that consent form  
23 to him in Spanish or in English?

24 A Offhand, I don't recall. I do remember him  
25 stating that he had no problem with English. He could

54

4 MR. BATCHELDER: Your Honor, the government  
5 has no further questions of this witness, except one.

8 A I am sure I did.

10 BY MR. MEYERS:

A I don't believe I did, sir.

15 MR. BATCHELDER: You have the grand jury  
16 minutes.

18 MR. BATCHELDER: That is the only grand jury  
19 minutes.

22 THE COURT: I am going to suggest that we take  
23 our mid-morning recess now.

25 MR. MEYERS: May I proceed, your Honor?



THE COURT: Yes.

BY MR. MEYERS:

Q Agent Levine, at the time Mr. Perez was arrested, that is, at 172nd and Wythe Avenue in the Bronx, did you hear anybody or any of the agents give Mr. Perez what we call the constitutional warnings?

A I gave him his --

Q You did?

A Yes, sir.

Q What, in Spanish?

A I gave it to him both in Spanish and in English.

Q Will you repeat for us, please, in Spanish the statements or the warnings that you gave, to the best of your recollection, to Mr. Perez at that particular point?

A Yes.

THE COURT: Let the interpreter translate it.

A (Through the interpreter) You have the right to remain silent. Any declaration of yours can be used against you in court or in any other proceeding. If you have no money to pay for a lawyer the Court will appoint a lawyer free, completely free. You also have the right to allege your right to remain silent and to help the government of the United States and to cooperate with us if you so wish.



1  
2 THE COURT: What did the defendant answer to  
3 that?

4 THE WITNESS: He expressed his willingness to  
5 help us in any way possible. He said "I'll do whatever  
6 I can".

7 Q Did you, at that point or at any other point  
8 tell him that if he didn't cooperate with the government,  
9 he would be likely to get 15 years or more in jail?  
10 Make it 10. Did you tell him he would receive punishment  
11 if he didn't cooperate with the government?

12 A No, sir.

13 Q You made no such statement like that?

14 A Nothing like that.

15 Q Are you saying these constitutional warnings  
16 that you just described were given as you were standing  
17 there at 172nd Street and Wythe Avenue at 10:30 p.m.  
18 while this man was handcuffed; is that right?

19 A To the best of my recollection we first --

20 O I can't hear you.

21 A To the best of my recollection, we first  
22 disarmed the man, then handcuffed him and put him in the back  
23 seat of the government car where we spoke to him. That  
24 is the best of my recollection. I might have given it to him  
25 standing too.

Q All we want is your best recollection.

A Right.

Q Is there an uncertainty in your mind as to whether or not you did give what you referred to as the constitutional warnings at the time that you placed the handcuffs on him or shortly thereafter or whether or not they were given as you say in the automobile as he was driven back to 1505 Grand Concourse?

A I don't believe I did as he was driven back. I think we stayed there right on that spot in the car. Because if I remember correctly, we didn't know what apartment he lived in. I am pretty sure that I gave him his rights seated in the car and then asked him, "What apartment do you live in?"

Q You mentioned you didn't know what apartment he lived in. What did this have to do with giving him the constitutional privileges?

A Part of our investigation, was, we wanted to determine where the man lived.

Q You had been on surveillance, had you not, from 10 o'clock on April 17th?

A I think earlier than that.

Q Would you say 9 o'clock?

A 9 or 8.

Q You had been there several hours at 1505 Grand Concourse, is that right?

A That is correct.

Q What car were you seated in?

A I was seated in the U.S. Government vehicle. Which one exactly I don't remember.

Q Was that taxicab there during the entire time?

A The taxicab was in a different location and we were in radio contact.

Q How far was the taxicab from 1505 Grand Concourse?

A I think they were right across the street.

Q Was there another agent in the taxicab?

A The confidential informant and another agent were in the taxicab.

Q Had the confidential informant informed you as to the specific apartment Mr. Perez lived in?

A No, he did not.

Q You did not know at the time you were surveilling this particular building?

A That is correct.

Q When you put Mr. Perez in the car at 172nd Street and Wythe Avenue, preparatory to taking him back to the apartment, isn't it a fact, Agent Levine, that when you arrested Mr. Perez that it was the intent at that particular



2 point to immediately take him back to that apartment?

3 A Would you repeat that? Can you please repeat that  
4 question?

5 Q Yes.

6 Isn't it a fact, Agent Levine, that when you  
7 arrested -- I mean you and the other agents arrested  
8 Mr. Perez at 172nd Street and Wythe Avenue?

9 A Yes.

10 Q Is that irrespective of any other consent or  
11 not consent that it was the intent of you agents to  
12 immediately take him back to the apartment and get access  
13 to that partment?

14 A No, sir.

15 Q When did you first learn of the information, if  
16 any, that had been submitted by an informant?

17 A I really can't -- I am not sure. I don't know  
18 whether it was the same day or the day before. I amnot sure.

19 Q When were you informed by either your superiors  
20 or your supervisor that you were to appear at 1505 Grand  
21 Concourse at a specific time on April 17th, 1974?

22 A To the best of my recollection it was earlier  
23 that day I was told to accompany the other agents.

24 Q Now, did you accompany the agent back to the apart-  
25 ment 1505 Grand Concourse with Mr. Perez?

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A Yes, sir, I did.

3

Q Pardon me?

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A Yes, sir.

5

Q You did?

6

A Yes.

7

Q Did you enter the apartment of Mr. Perez at

8

1505 Grand Concourse with any of the other agents?

9

A Yes, sir, I did.

10

Q How many agents did enter the apartment 1505

11

Grand Concourse?

12

A I believe it was just Special Agent Montagne and

13

myself and Mr. Perez.

14

Q No other agents?

15

A I don't think there were any other agents there.

16

Q And was Mr. Perez in handcuffs during the

17

entire time that he was in the apartment?

18

A He certainly was.

19

MR. MEYERS: No further questions.

20

MR. BATCHELDER: Yes, your Honor, the government has

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no further witnesses at this time.

22

THE COURT: The government rests?

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2 MR. MEYERS: The defendant rests, your Honor.

3 The defendant moves, at this time, to direct  
4 the suppression of the evidence in this case. First the  
5 defendant's contention is that the arrest of this defendant  
6 was made without probable cause. The testimony, as I  
7 gather it, is that an agent received -- he said -- somewhere  
8 about April 10th or thereabout some communication from an  
9 informant. He referred to him as an informant who  
10 apparently had only either cooperated or talked with the  
11 government on one prior isolated situation.

12 As I gather the testimony that has been con-  
13 veyed or the information that is supposed to have been  
14 conveyed to the particular agent upon which the government  
15 bases the alleged validity of the arrest was that the  
16 defendant had been in the habit of leaving the apartment  
17 of 1505 Grand Concourse and that he would be leaving.

18 In other words, there is no specific information.  
19 No reliable information which would ever leave a basis,  
20 in view of all the cases that have been determined by this  
21 court and the Supreme Court, to justify a probable cause  
22 arrest.

23 There was no statement to the effect that  
24 if you go to a particular place you will find a particular  
25 man who will have in his possession cocaine which he



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2 intends to sell. There's no such evidence along this  
3 line. Assuming that he may have sold two years ago,  
4 six months ago, that he would have the habit. But to  
5 justify the arrest at that particular point without an  
6 arrest warrant certainly doesn't appear to have any probable  
7 cause to make the arrest.

8 The very physical presence of the informant across  
9 the street who points out the man doesn't mean that the  
10 government had probable cause to make the arrest; that they  
11 were aware that this particular defendant had committed a  
12 crime or was about to commit a crime; that his intention  
13 was to distribute or sell the particular cocaine.

14 Therefore, we say, in view of the fact that the  
15 arrest was illegal, it must fall by the wayside.

16 The second point we raise is that there was no  
17 constitutional safeguards or warnings given to this defend-  
18 ant. The question as to whether or not he understood the  
19 nature of the warnings -- and the burden is very, very  
20 heavy on the government that the defendant understands and  
21 knows what he is waiving.

22 The very fact that some of the conversation had  
23 to be carried on in Spanish and some of the conversation had  
24 to be carried on in English indicates that he had no  
25 awareness of what his constitutional rights were.

2 THE COURT: In the light of the evidence, what  
3 basis do you say there is for the Court not accepting the  
4 fact that the defendant understood what was said to him  
5 in his native language or the language he speaks?

6 MR. MEYERS: Well, the very fact that the man  
7 was required -- let's assume -- questions are being pro-  
8 pounded to him in both Spanish and English.

9 THE COURT: The witness testified that he gave  
10 him his constitutional rights in Spanish. I'm asking  
11 you what basis is there to disregard his testimony? You  
12 made the statement, I must say I don't understand you with  
13 respect to that.

14 MR. MEYERS: I was basing it primarily on the  
15 fact that it was essential that questions be propounded  
16 to this particular individual in both Spanish and English.  
17 Even if he understood the question, can it be said that  
18 his assent to the waiver of the constitutional rights  
19 under the circumstance, handcuffed, surrounded by these  
20 three individuals with guns drawn at 10:30 at night in  
21 an unmarked car, whether that would be considered under the  
22 atmosphere and circumstances that prevailed to have been  
23 a voluntary consent.

24 THE COURT: That's different.

25 MR. MEYERS: Now, insofar as the consent to



2 search, we say if the arrest was invalid, the consent to  
3 search must necessarily fall. The consent to search,  
4 as your Honor will note in the response to the motion,  
5 the government indicated that the execution -- they say  
6 we didn't make the search because we considered it as an  
7 incident to the arrest. They say we made the search  
8 because you consented to it. You gave us both an oral  
9 and written consent.

10 THE COURT: You are talking now of the search in  
11 the apartment?

12 MR. MEYERS: That's right. Of course I would  
13 say if the government had probable cause to make the arrest,  
14 they certainly did have the right to search. Under the  
15 circumstances, it would be limited as to the question of  
16 whether or not he had a gun in his possession which might  
17 in any way put the arresting officers in jeopardy.

18 To go further than that, to go into his pocket  
19 and come out with a key chain or wallet goes beyond the  
20 normal search incident to an arrest.

21 Now, insofar as the consent to search in the  
22 apartment is concerned, as I indicated in the response to  
23 the motion, they indicated we had this man execute a  
24 search at the apartment. It now develops it was never  
25 done at the apartment. It was done some time after.



2 Assume he did, there was no question the signature  
3 appears. What were the circumstances?

4 Here we have a fait accompli. They are  
5 searching the apartment. They are attempting to retro-  
6 actively validate a search that they didn't have a right  
7 to make in the first place. It's inconceivable that the  
8 man would say "Take me back to the apartment." We must  
9 again consider the circumstances. Was it voluntary?  
10 What alternative did he have?

11 They take him back to the apartment. They  
12 have the physical possession of the keys to the apartment.  
13 All they had to do, if they had possession of the keys,  
14 nobody could have gotten in the apartment. There was no  
15 emergency indicating that if they didn't go into that  
16 apartment immediately that contraband which they needed would  
17 be seized. They had plenty of opportunity, even after  
18 the arrest to have gotten a search warrant.

19 The evidence seems to be that as far back as  
20 April 10th of 1974, they were aware of the same situation  
21 that prevailed on April 17th. No attempt was made to go to  
22 a court.

23 The Supreme Court has held that there must be,  
24 that the man's home is inviolate. If there is an oppor-  
25 tunity to secure a search warrant, go out and get it.

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2 As I say, they even had time to get it even after they  
3 had taken possession of the keys. The objective was to  
4 go back to the apartment. We maintain that the search  
5 was unreasonable.

6 I think that the courts have held that the search  
7 must be within the immediate area. The man was arrested  
8 at 172nd Street and Wythe Avenue. To take him back to  
9 the house, the search constitutes an unreasonable search.

10 We feel in view of all the circumstances involved  
11 in this case, we feel that the government has failed to  
12 establish that the case was based on probable cause to make  
13 the arrest.

14 What were the facts and state of mind and circum-  
15 stances that existed at the moment of the arrest? The  
16 agent testified that the \$5 bill with the cocaine was not  
17 discovered by him until he had gone down to the Drug  
18 Enforcement Agency for the first time. Despite the fact,  
19 you will find in the reply to the motion of the government,  
20 they say they found it on his person.

21 I think the government has failed to establish the  
22 very element which is essential that they establish on their  
23 part that there was a probable cause to make the arrest in  
24 this case.

25 MR. BATCHELDER: May I be heard, your Honor?



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Your Honor, taking the evidence at the time the agents made the arrest: They had information from a previously reliable informant who had made one other case leading to two convictions, that a man would be coming from a building. He had used this modus operandi in the past; that he would be carrying cocaine with him; that it was likely he was armed.

The informant sat outside that building with those two agents, the man comes down from that same building. Corroboration No. 1. He comes across and gets into a car. He's pointed out by the informant and he says "That's the man."

They follow the man. They are told that he will be armed.

They go around the corner. They arrest that person. At that time, they reach in and a la Adams v. Williams, they find a gun, conveniently left out by defense counsel.

They find a gun. Corroboration No. 2. You said he might be armed and was dangerous.

At that time, the evidence indicates and there's nothing to contradict this evidence, I might add. He was removed from the car and given his rights. I won't dwell on the issue of his rights. I think your



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2 Honor has dwelt on that as to whether they were given or  
3 not.

4 At that time he indicates voluntarily, orally  
5 consents, and the evidence indicates from one agent that  
6 he orally consented. From the other agent it was  
7 testified that he didn't have the form, that the form would  
8 be executed subsequently.

9 The defense counsel makes a great deal about the  
10 circumstances that surrounded the arrest, your Honor.  
11 I would say that if they didn't take the gun off him with  
12 their guns drawn -- it was indicative of good sense in  
13 light of what they found.

14 There's no evidence that they pointed a gun  
15 at the defendant and said "Sign this consent form" which  
16 they didn't have. Indeed he was detained there probably  
17 three or four minutes.

18 He was then brought back to his apartment.  
19 There is no evidence, again, except what Mr. Meyers states  
20 that the reason, the sole reason was to go back to the  
21 apartment. Indeed, your Honor is probably just as familiar  
22 with the fact that the statement was answered directly to the  
23 contrary by the agent, nor has there been any evidence  
24 indicated otherwise. He said no, that was not the purpose.  
25 They did not have the forms with them. That may be wrong

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2 in hindsight, but significantly, your Honor, in a detention  
3 which in no way encompasses the type of detention such as  
4 Moraro v. United States, where it goes on for two or three  
5 hours, where a person is detained and questioned.

6 This individual was brought down to Drug  
7 Enforcement headquarters and indeed he was probably lodged  
8 within two hours or subsequent to that and he executed  
9 a form which is Government's Exhibit 7. He executed a  
10 form at that time.

11 Significantly, the agent couldn't remember  
12 whether he gave it to him in Spanish or in English, but  
13 he stated that he understood English at that time.

14 Now, your Honor, the mere finding of the gun, in  
15 light of Adams, in which an unreliable informant, a person  
16 whose reliability had never been established said to the  
17 individual, there is a person standing across the street who  
18 has a gun. The Supreme Court stated that if the agent has  
19 reason to believe, just looks in the car and sees the gun,  
20 then that establishes probable cause.

21 Here, we're on stronger ground, when a guy would  
22 be coming out of the building and in all likelihood he would  
23 be carrying cocaine. He had used this modus operandi in  
24 the past and he was described as a male negro about five-  
25 six, thirty-two years of age and was pointed out by the

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2 informant and the finding of the gun, that establishes  
3 a probable cause for that, I think, on three grounds:  
4 The time, the description of the individual to be coming  
5 out and the finding of the gun after they placed the in-  
6 dividual under arrest.

7 THE COURT: Is there anything significance  
8 to the fact that the cocaine was not found until the  
9 processing of the defendant?

10 MR. BATCHELDER: The government would argue  
11 that the finding of the cocaine was not the sole probable  
12 cause for the arrest. Admittedly it would have been better  
13 if they had found the cocaine at that time. As in Adams,  
14 they found a gun. Whether the agent was unable at that  
15 time to determine what was in the \$5 bill, let's just say  
16 for argument sake, that he did take out this white powder.  
17 No agent in his right mind looking at this white powder could  
18 say it was cocaine. It could be anything.

19 I think more strong for the government's case  
20 is the fact that the gun was found at that time. The man  
21 will be armed or there is a reasonable probability that the  
22 man will be armed. I think the informant was corroborated  
23 at that time. I think that ends the probable cause issue  
24 right there.

25 The issue as to the consent then follows from



2 that. I think on Draper and as I say, cases by  
3 this court are quite recent, the fact that Mr. Meyers takes  
4 the position -- the defense takes the position -- that the  
5 defendant is under arrest necessitates that there is a  
6 -- the Second Circuit in Sindella has not said that at all.  
7 Why are the issues to be determined non-voluntary in this  
8 case? There's no indication of physical or psychological  
9 coercion. There's no indication that the defendant  
10 in any way was overborne. He's not a young man. He's  
11 thirty-two years old. There is no indication that the  
12 defendant ever stated to anybody that the statements  
13 weren't voluntary.

14 Indeed the statement made by Special Agent Montagne  
15 -- testified to the interview before an Assistant United  
16 States Attorney in this office, that the defendant stated  
17 that he understood everything that was told him and he  
18 said: "I signed the form at the office. They explained  
19 to me that I didn't have to let them search the apartment."

20 No statement was made with respect to the volun-  
21 tariness that would vitiate the search.

22 On these factors, your Honor, the government  
23 believes that the search and the consent should be upheld  
24 and to argue a Schimmil point, in light of the consent to  
25 search, confuses the issue because Schimmil goes solely to

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an arrest situation in which the objectives are seized

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and there is no voluntary consent given and the defense

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counsel in that instance confuses the law.

5

Based on all these factors, your Honor, the

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government would contend that the probable cause, with the gun,

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was satisfied. He may be armed. Cocaine adds a little

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more credence to it. The issue of consent, we have

9

no evidence, nothing whatsoever.

10

THE COURT: You're referring to consent as far

11

as the search of the apartment?

12

MR. BATCHELDER: That is correct, your Honor.

13

THE COURT: They are really two separate issues.

14

One, was there probable cause for his initial arrest, and

15

subsequent thereto, was there a voluntary consent on the

16

part of the defendant, fully aware of his constitutional

17

rights?

18

Assume, it is the situation where it is found

19

that the initial arrest was not made on probable cause,

20

would that vitiate the consent to search?

21

MR. BATCHELDER: I don't believe so.

22

THE COURT: Do you have any cases to support

23

your position?

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MR. BATCHELDER: I don't have any case on that

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point. I have not gone into it in that area.

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If your Honor wishes, we will try and find some cases. I think the issue would be like Tucker v. United States. Could the person who was detained for questioning subsequently give a voluntary statement even though the arrest may not be valid in the first place? I believe Tucker states yes. I would argue that case in that it's the same way. A person could be detained in a situation far more compromising than in Tucker. Use the gun. In Tucker, it was a bunch of men walking down the street with some wind chimes on their shoulder and on a Sunday morning, from an old railroad yard and the question was, did they have probable cause at that time to arrest them.

In Tucker, they said probably not, but that the statements that were taken were acceptable, as I remember the case, sir.

Thank you, your Honor.

THE COURT: Well, as the Court indicated a moment ago, there are two separate issues here.

One, was the initial arrest based on probable cause with the subsequent right, if it were based on probable cause, to search the defendant as a incident of his arrest.

Two, the issue as to whether or not the defendant voluntarily consented to the search of his



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2 apartment.

3 In the absence of such consent, there would  
4 be, in fact, no basis for entering that apartment, even though  
5 they had the keys. The evidence indicates that based  
6 upon information supplied by an informant of previous  
7 reliability, although not extensive previous experience,  
8 who identified the defendant, the officers had probable  
9 cause to arrest the defendant and conduct a search in the  
10 course of which a key and wallet was found on his person.

11 The fact that the wallet in which was contained  
12 the cocaine was not discovered until during the course of  
13 the defendant's processing, following his arrest, does not  
14 remove the probable cause aspect. The probable cause  
15 must exist as of the time of the arrest.

16 As to the search of the apartment, the Court is  
17 persuaded that the defendant initially gave his oral consent  
18 and later corroborated it by his written consent only  
19 after he was advised in Spanish, a language that he under-  
20 stood, of his constitutional rights; that he fully under-  
21 stood his rights and that such consent was voluntarily and  
22 knowingly given.

23 Accordingly the motion to suppress is denied.

24 (Discussion off the record.)

25 THE COURT: Let's put this down temporarily for  
September 14th at 10:00 a.m., courtroom 1306.

WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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Michael Levine	50	55		

EXHIBIT INDEX

<u>Government</u>	<u>Identification</u>	<u>In Evidence</u>
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Defendants

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---	----	----

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